

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

CHRISTINE QUERRY  
Plaintiff,

vs.

COMMISSIONER, SOCIAL SECURITY  
ADMINISTRATION  
Defendant.

Civ. No. 06-1675-TC

FINDINGS AND RECOMMENDATION

Coffin, Magistrate Judge:

Before the court is defendant's Motion (#12) to Remand Case to Agency. For the reasons that follow, defendant's motion should be denied.

BACKGROUND

Plaintiff filed this action to review the final order of the Commissioner of Social Security denying her claim for disability insurance (SSDI) benefits on the grounds that she was not disabled as defined by the provisions of the Social Security Act. In plaintiff's view the decision of the Commissioner is not supported by substantial evidence and remand for an award of

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1 benefits is required. Defendant concedes that the ALJ erred but  
2 moves to remand so that the matter can be decided de novo.  
3 After a review of the record and applicable legal standards, I  
4 agree with plaintiff and recommend that defendant's motion for  
5 remand should be denied and the matter remanded for an award of  
6 benefits.

#### 7 8 Medical History

9 Plaintiff, a 54-year-old woman and high school graduate,  
10 alleges that she is disabled for purposes of disability insurance  
11 eligibility, 42 U.S.C. § 423(a)(1), based on a number of  
12 conditions: (1) post-surgical pain and degenerative disc disease  
13 in her neck and back; (2) residual symptoms from bilateral carpal  
14 tunnel syndrome; and (3) depression. Tr. 18, 71, 80-81, 85, 232,  
15 286.

16 The claim stems from limitations attributed to the following  
17 medical history drawn from the administrative record. In 1993,  
18 plaintiff underwent surgery to repair herniated discs in her  
19 neck. Tr. 321. Her neck pain returned in 2002, and she again  
20 underwent neck surgery, namely an anterior cervical discectomy  
21 and fusion at C4-5 and C5-6. After the surgery, plaintiff  
22 experienced pain in her right arm. Tr. 313, 322.

23 In 2003, plaintiff injured her neck while at work. The  
24 emergency room physician who treated her, Dr. Crane, diagnosed  
25 her with cervical radiculopathy and advised her to stay home  
26 from work and to visit her orthopedic physician, Dr. Bert. Dr.  
27 Crane also noted that plaintiff suffered from depression and  
28 noted her medical regimen for that condition. Tr. 140-41.

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1 Plaintiff followed up with Dr. Bert, who characterized her work  
2 injury as a cervical strain prescribed pain medication and  
3 recommended that plaintiff return to "secretarial" work and  
4 refrain from lifting more than 20 pounds. Tr. 233.

5 In March, April, May, and June of the following year,  
6 plaintiff returned to Dr. Bert. Initially, she complained of  
7 pain radiating from her neck to her arms that interfered with her  
8 work. Tr. 229. Dr. Bert's physical assistant noted that  
9 plaintiff feared that her pain medications were disrupting her  
10 concentration at work and opined that plaintiff experienced  
11 weakness in her shoulder, pincer grasp, and intrinsic. Tr. 229.  
12 Dr. Bert diagnosed plaintiff with left-side carpal tunnel  
13 syndrome and opined that she should not lift more than twenty  
14 pounds. He also opined that plaintiff's neck condition did not  
15 warrant new neurological findings. Tr. 228.

16 Six weeks later, plaintiff returned to Dr. Bert complaining  
17 of radiating pain from her neck to shoulders, leg numbness,  
18 muscle spasms, and "marked limitation of motion." Tr. 226. Dr.  
19 Bert recommended that plaintiff refrain from work until her  
20 condition improved, and upon her return, she should confine  
21 herself to light work and not lift bags of coins over her head,  
22 as she had previously done for her employer. Tr. 226. Still  
23 later, in June, Dr. Bert treated plaintiff for lower back pain  
24 and leg numbness. Her MRI revealed mildly moderate spinal  
25 stenosis at L3-4 with a spondylolisthesis, 3 on 4, grade 1. Tr.  
26 224, 238. Dr. Bert recommended epidural spinal injections to  
27 manage plaintiff's pain and physical therapy. Tr. 224.

28 In July, plaintiff was examined by Dr. Rosenbaum, at the

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1 request of her employer's workers' compensation insurer. Dr.  
2 Rosenbaum diagnosed plaintiff with cervical spondylosis, status  
3 post anterior cervical fusion C4-7, cervical strain, lumbar  
4 spondylosis and lumbar strain or lumbar degenerative  
5 symptomology, and functional overlay. Tr. 159. In his view,  
6 plaintiff's work-related neck injury had not worsened her  
7 preexisting conditions, for purposes of determining employer  
8 responsibility. Tr. 161.

9 In September of that year, Dr. Bert contested Dr.  
10 Rosenbaum's opinion, writing that plaintiff's work injury  
11 aggravated her preexisting spondylosis and that she would not be  
12 able to meet the demands of her current job, but she could  
13 accomplish "light work activity." Tr. 222. The following  
14 month, Dr. Bert opined that plaintiff continued to require  
15 epidural injections and physical therapy to treat her pain and  
16 conditions. Tr. 221.

17 In November 2004, plaintiff was examined by Dr. Pylman. He  
18 noted that plaintiff reported constant pain rated at 6, on a  
19 scale of one to ten, in her lower and upper back. He recorded  
20 that her symptoms worsened over time and her pain radiated into  
21 her left foot. Tr. 220. Dr. Pylman recommended a cervical  
22 epidural injection to treat plaintiff's pain, and more physical  
23 therapy. Tr. 219. The following month, Dr. Bert recommended  
24 that plaintiff continue to undergo epidural injections by Dr.  
25 Pylman. Tr. 215. Plaintiff reported to Dr. Pylman that the  
26 injections relieved her neck pain, but not her shoulder and lower  
27 back pain, which impaired her sleep. Tr. 213, 215. In January  
28 2005, Dr. Pylman treated plaintiff again for increased back pain,

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1 numbness and stinging sensations in her left foot, and  
2 sleeplessness. Tr. 211-12.

3 In February 2005, Dr. Golden examined plaintiff on behalf of  
4 her employer's insurer, for the limited purpose of determining  
5 whether plaintiff's workers' compensation claim related to her  
6 on-the-job neck injury. With respect to plaintiff's "accepted  
7 condition" for purposes of her workers' compensation claim, Dr.  
8 Golden diagnosed plaintiff with cervical spondylosis, status post  
9 anterior cervical fusion at C4-7, cervical strain attributed to  
10 her work injury, and psychosomatic responses. Tr. 282. With  
11 reference to the diagnosed conditions, Dr. Golden opined that her  
12 residual functional capacity allowed her to sit, stand, or walk  
13 for one hour at a time; occasionally lift 20 pounds, and  
14 frequently and constantly lift or carry 15 pounds; but  
15 "permanently precluded [her] from frequently performing the  
16 activities of climbing, reaching, and pushing or pulling more  
17 than 20 pounds." Tr. 283. Dr. Golden also noted that plaintiff  
18 "may have limitations in other activities due to her chronic back  
19 pain problem, which is not a part of this evaluation." Tr. 283.

20 Dr. Pylman continued to treat plaintiff for her ongoing pain  
21 problems. He increased her pain medication in March 2005 and  
22 noted that plaintiff reported that although the medication  
23 alleviated her pain, it caused forgetfulness and vertigo. Tr.  
24 255; 258. In June 2005, Dr. Bert treated plaintiff for carpal  
25 tunnel syndrome after plaintiff reported numbness in both hands  
26 when using a computer keyboard. Because she relies more heavily  
27 on her right hand, Dr. Bert recommended a right-side carpal  
28 tunnel release. Plaintiff underwent the surgery but continued to

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1 experience symptoms on her left side. Tr. 297, 300-04.

2 In January 2006, plaintiff was involved in a motor vehicle  
3 accident and was treated for neck and back pain. Tr. 261-62.  
4 During the following months, Dr. Pylman treated plaintiff for  
5 increased lower back pain and discovered sacral cysts and  
6 degenerative changes in plaintiff's spine. Tr. 291-93. By  
7 April, Plaintiff reported that her neck, shoulder, and back pain  
8 was making it difficult for her to sit or stand. Tr. 286.

9 In May 2007, Dr. Pylman provided his opinion on plaintiff's  
10 residual functioning capacity. Tr. 326-27. He determined that  
11 plaintiff was capable of infrequently lifting up to 10 pounds and  
12 incapable to frequent pushing, pulling, climbing, or reaching.  
13 He opined that plaintiff could work for an hour in a sedentary  
14 position but was required to take a twenty-minute rest break  
15 between each hour of work. Dr. Pylman noted that plaintiff's  
16 pain medications limited her ability to concentrate and focus.  
17 Tr. 326-27.

#### 18 19 Procedural Background

20 At the hearing before the ALJ, the Vocational Expert  
21 testified that Dr. Pylman's opinions on plaintiff's RFC would not  
22 allow for any kind of work. The VE further testified that if  
23 plaintiff were restricted to lifting no more than 10 pounds, she  
24 could not perform the light work jobs requiring no complex tasks  
25 that the VE had initially discussed: office helper, and bindery  
26 machine operator. The VE also stated that, if required to take  
27 a 20-minute break between each hour of work, an employee would  
28 not be able to remain at any job. Tr. 356-58.

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1       The ALJ applied the implementing regulations that govern the  
2       five-step inquiry into whether or not a claimant has a qualifying  
3       disability. 20 C.F.R. § 404.1520(b)-(g). The pertinent ALJ  
4       findings included the determination, at step two, that  
5       plaintiff's impairments -- discogenic and degenerative disc  
6       disease of the spine, carpal tunnel syndrome, and affective mood  
7       disorder -- are severe. At step three, the ALJ found that  
8       plaintiff's impairments do not meet or equal a listed impairment.  
9       At step four, the ALJ determined plaintiff's residual functioning  
10      capacity to allow her to "lift or carry up to ten pounds  
11      frequently and twenty pounds occasionally." The ALJ also found,  
12      "In addition, the claimant cannot perform any complex tasks" and  
13      is unable to return to her past work.

14      At step five, the ALJ found that plaintiff's RFC does not  
15      allow her to perform the full range of light work, thus her RFC  
16      falls between the exertional levels required by light work and  
17      sedentary work. Notwithstanding the opinion of the VE and the  
18      medical evidence of plaintiff's reaching limitations in the  
19      opinions of Drs. Pylman and Golden, the ALJ found that she is  
20      able to perform jobs in significant numbers in the national  
21      economy, namely the occupations of office helper and bindery  
22      machine operator. Tr. 18, 19, 23, 24.

#### 23 24                   DISCUSSION

25      In this case, plaintiff challenges the findings of the ALJ  
26      at steps four and five. Tr. 18-24. In plaintiff's view, the  
27      ALJ's RFC finding at step four failed to include all of  
28      plaintiff's limitations. In particular, plaintiff asserts that

1 the ALJ disregarded limitations against reaching set forth in the  
2 opinions of Drs. Pylman and Golden. Plaintiff also challenges  
3 the finding at step five that plaintiff could perform other work,  
4 arguing that here physical and mental limitations preclude any  
5 substantial gainful activity.

6 As noted above, plaintiff contends that the ALJ's decision  
7 should be reversed because the ALJ improperly rejected  
8 plaintiff's allegations, and because the ALJ improperly rejected  
9 the opinions of Drs. Pylman and Golden, which included opinions  
10 concerning limitations on reaching that undermine the ALJ's  
11 determination at step five. In plaintiff's view, the proper  
12 remedy is to credit the testimony of the physicians and remand  
13 for an award of benefits.

14 Defendant concedes that the ALJ "did not adequately address  
15 plaintiff's mental impairment, did not give sufficient reasons  
16 for rejecting her testimony, and did not adequately address any  
17 of the medical opinions." Def. Memo. 2. Defendant argues that  
18 remand for de novo proceedings to allow the ALJ to decide the  
19 issues again. However, on this fully developed record, remand  
20 for an award of benefits is appropriate.

21 Under 42 U.S.C. § 423(a)(1)(A), a "disability" is the  
22 "inability of engage in any substantial gainful activity by  
23 reason of any medically determinable physical or mental  
24 impairment which . . . has lasted or can be expected to last for  
25 a continuous period of not less than 12 months." As illustrated  
26 by the ALJ's findings, implementing regulations govern the five-  
27 step inquiry into whether or not a claimant has a qualifying  
28 disability. 20 C.F.R. § 404.1520(b)-(g).

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1           The posture of the case requires application of the "Smolen  
2 test," which governs when the court may credit improperly  
3 rejected medical source evidence and remand for a finding of  
4 disability and award of benefits. Smolen v. Chater, 80 F.3d  
5 1273, 1292 (9th Cir. 1996). The court may do so when (1) the  
6 ALJ has failed to provide legally sufficient reasons for  
7 rejecting medical source evidence; (2) the record requires no  
8 further development before a determination of disability may be  
9 made; and, (3) the record demonstrates that ALJ would be required  
10 to find the claimant disabled were such evidence credited. Id.  
11 Here, the parties and the court agree that the ALJ failed to  
12 provide legally sufficient reasons for rejecting both Dr.  
13 Golden's and Dr. Pylman's opinions that plaintiff is limited to  
14 only occasional reaching.

15           Thus, the Smolen inquiry proceeds to step two. The parties  
16 disagree on whether the record requires further development.  
17 Plaintiff contends that, when considered with ALJ's own finding  
18 that plaintiff limited to work requiring light exertion, the  
19 record warrants a finding of disability. I agree.

20           As an initial matter, taking notice of the Thomson/West  
21 Dictionary of Occupational Titles (DOT), see 20 C.F.R. §  
22 404.1566(d), restrictions against work requiring greater than  
23 light exertion and more than occasional reaching would preclude  
24 the two unskilled occupations that the ALJ found plaintiff could  
25 perform, office helper and bindery machine operator (both of  
26 which are classified as requiring "frequent" reaching, DOT #  
27 239.567-010, 653.686-026), confirming that the basis on which the  
28 ALJ made his finding that plaintiff is "not disabled" is

1       erroneous.

2           Evaluating each opinion in view of the record, it becomes  
3       clear that the ALJ would be required to find that plaintiff is  
4       "disabled" on the existing record, without need for further  
5       proceedings. The court takes guidance from Social Security  
6       Ruling (SSR) 83-12, which addresses the ALJ's disability inquiry  
7       where a claimant's RFC falls between an upper and lower  
8       exertional range of work. Here, plaintiff's RFC falls between  
9       light and sedentary exertional levels. Tr. 24. Further, the  
10      ruling explains the application of numbered table rules in  
11      Appendix 2 of Subpart P of the regulations as a framework for  
12      adjudicating claims.

13           Each table rule directs a conclusion on whether a claimant  
14      is disabled where the ALJ's individual findings coincide with the  
15      rule criteria. Here, the applicable rule for the sedentary  
16      exertional level is 204.14, in Table 1. Under the rule, a  
17      claimant will be considered disabled if (1) she has a maximum  
18      sustained work capability that is limited to sedentary work; (2)  
19      she is "closely approaching advanced age"; (3) her education  
20      level is "high school graduate or more" but without background  
21      that would provide for direct entry into skilled work; and (4)  
22      her previous work experience is classified as "skilled or semi-  
23      skilled, but with nontransferable skills." The rule presumes  
24      that the claimant is capable of 200 sedentary occupations. 20  
25      C.F.R. Pt. 404, Subpt. P, App. 2, 201.00.

26           The applicable rule for the light work exertional level is  
27      202.14, in Table 2. Under that rule, a claimant will be  
28      considered "not disabled" where the same criteria are met. The

1 record indicates that claimant meets the criteria for each rule,  
2 warranting a finding of "disabled" under rule 204.14 and "not  
3 disabled" under rule 202.14.

4 According to SSR 83-12, where, as here, a claimant's  
5 exertional level falls between two rules that direct opposite  
6 conclusions, a finding of "disabled" is justified where the  
7 exertional capacity "is significantly reduced in terms of the  
8 regulatory definition," indicating "little more than the  
9 occupational base for the lower rule." In other words, a  
10 dramatically eroded occupational base can warrant a finding of  
11 "disabled." Social Security Ruling 83-12.

12 Here, both doctors opined that plaintiff's RFC precluded her  
13 from frequently reaching. Tr. 283. If limited to reaching only  
14 occasionally, plaintiff would be precluded from performing 1668  
15 out of 1708 combined light and sedentary unskilled occupations  
16 listed in the DOT. The occupational base, eroded to 40 for both  
17 light and sedentary work, is therefore obviously affected.  
18 Social Security Ruling 83-12 instructs adjudicators that where  
19 "little more than the occupational base for the lower rule" is  
20 available to the claimant due to the level of her restrictions,  
21 a finding of disabled can be justified. (Emphasis added.) Here,  
22 when the opinions are credited with respect to plaintiff's  
23 reaching limitation, plaintiff is left with an occupational base  
24 for the lower rule (i.e., 204.14, governing sedentary work) of  
25 only four occupations. Here, claimant's limitations preclude her  
26 from working at all but 4 of the 200 jobs that rule 204.14  
27 presumes that she can perform and still qualify as disabled.  
28 Because claimant cannot achieve more than two percent of the

1 occupational base of the lower rule, much less "little more" than  
2 that base, it is difficult to escape the conclusion that, on  
3 remand, she would be considered disabled on this record.  
4 Moreover, as plaintiff insists, additional limitations  
5 established by other improperly rejected medical evidence only  
6 sharpen the outcome.

7 In sum, application of the Smolen criteria requires reversal  
8 and remand for a calculation of benefits. Because the Smolen  
9 test resolves the disposition of defendant's motion, the court  
10 need not consider plaintiff's additional arguments that the ALJ  
11 failed to credit plaintiff's testimony and inadequately addressed  
12 her mental impairment.

13 CONCLUSION

14 Defendant's Motion (#12) to Remand to Agency should be  
15 denied. The matter should instead be remanded for an award of  
16 benefits.

17  
18 IT IS SO RECOMMENDED.

19  
20  
21 Dated this 29<sup>th</sup> day of August, 2007.

22  
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24   
25 THOMAS M. COFFIN  
26 United States Magistrate Judge  
27  
28